Office Supreme Court, U.S.
FILED
JUN 21 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 977

ROBERT E. FUNKHOUSER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

ROBERT E. FUNKHOUSER,
Petitioner
Davidsonville, Maryland.

June 20, 1962

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 977

ROBERT E. FUNKHOUSER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONER'S REPLY BRIEF

JURISDICTION

The petition for a writ of certiorari was timely filed on May 16, 1962 under the extension granted by Chief Justice Warren extending time for filing the petition to May 25, 1962.

THE QUESTION PRESENTED

Petitioner complains of the sentence in this case on the grounds that he was illegally convicted and sentenced under Section 145(b) of the Internal Revenue Law of 1942 which provides:

> SEC. 145(b): FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO DEFEAT OR EVADE TAX.—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

The penalties of that Section can only be imposed for the evasion of taxes imposed by the chapter. The record shows that no taxes had been imposed by the chapter on this petitioner. (E. 57-58).[1] Petitioner had reported all gross income and all expenses. (Pet. 3). Respondent fully admits this fact on page 3 of Respondent's brief in the Court of Appeals where respondent said:

> "He reported gross income of approximately $360,000. . . . Evidence of the wilful intent to evade the payment of taxes was shown when the Government produced in evidence four financial statements signed by Mr. Funkhouser and submitted by him to the Prince Georges Bank and Trust Company on July 22, 1943, March 1, 1945,

[1] (E. 57) refers to appendix of petitioner's brief in Court of Appeals. (App.) refers to appendix of petitioner's brief in Court of Appeals. Other references are to specific records and papers.

April 24, 1946, and April 29, 1947, respectively. These statements contain the following items:

July 22, 1943	Yearly salary	$16,000.
March 1, 1945	Yearly salary	$14,000.
April 24, 1946	Yearly salary	$11,000.
April 29, 1947	Yearly income	$10,000.
	Total	$51,000.

whereas the tax returns filed by Mr. Funkhouser for those years indicated a net loss in 1943 and 1945 of $697.46 and $4,346.21, respectively, and a net profit in 1946 and 1947 of $1,430.24 and $2,500.02, respectively." (Brief and Appendix for Appellee p. 3-4).

The testimony of respondent shows that for all of the years respondent made no inquiry, calculation, computation or tabulation of petitioner's books, records and returns. (App. 28, 35, 36, 46, 27, 48).

Respondent knew, and respondent told the District Court:

> By Mr. Green: As a matter of fact, from the beginning it was never considered possible to work this case on a net worth basis. (Tr. 6-3-52, page 1360).

Respondent just set up the $51,000 listed as salary for four of the five years which was about one seventh of the total gross income reported, and then without making any examination, calculation, inquiry, computation or tabulation (App. 24-48) respondent's agent set up about one fourth, or $90,000 of the $360,000 gross expenses reported by petitioner and charged them as "fraudulent deductions" for this prosecution. (Respondent's brief, pages 3-4).

Respondent ignored the fact that $360,000 gross income was reported and $360,000 expenses were re-

ported. Every item of receipts and every item of expenses was reported to comply with the requirements of Sections 41, 51, 54 of the Internal Revenue Law. The record shows that respondent found every item of income and every item of expenses listed. Respondent said:

> By Mr. Green: We have members of the jury, at great length specified to you one by one the various expenses which Mr. Funkhouser on his books and records, and in his income tax returns, said were incurred in connection with his business. (Tr. 6-4-52, page 4).

The Internal Revenue Law (Sec. 54, 57, 271, 272) then required the respondent (not the petitioner) to examine those returns and to determine which of the listed items of expense were legally allowable as deductions from gross income for the determination of the correct amount of income subject to tax.

The listing of every item of income and every item of expense was necessary to show all the facts and was not fraudulent as charged. (Sec. 54, 57, 271, 272).

The record shows the books, records and returns were turned over to respondent for the required examination but respondent never made any examination, inquiry, calculation, computation or tabulation (App. 27, 28, 35, 36, 45, 46, 48); never mailed any 90-day notice of deficiency as required by Section 272 (E. 27-28) and just set up several different sets of "assumed figures" for the calculations (App. 48) and made several different sets of calculations on those "assumed figures" (App. 48-49) and charged them as taxes due, owing and evaded for this prosecution (App. 48-49).

The record shows that respondent took those "assumed figures" to the Department of Justice and they

were examined by Andrew F. Oehmann, the then head of the criminal tax section. Oehmann is now the Executive Secretary to Attorney General Robert Kennedy, and Andrew F. Oehmann ascertained that there had been no examination, that the figures were "assumed figures" set up without any examination, inquiry, calculation, tabulation or determination of the correct amount of income subject to tax as required by statute (Sec. 54), without determination of any deficiency (Sec. 271), without any notice of deficiency as required by Sec. 272, and in violation of the expressed requirements of Section 272.

Andrew F. Oehmann as Head of the Income Tax Criminal Section of the Department of Justice promptly rejected the "assumed figures" and returned the papers to the Internal Revenue Service for the required examination. (Government Exhibit "A").

The record shows that thereafter respondent made no inquiry, examination, calculation, tabulation, determination of any deficiency, notice of deficiency, assessment of any deficiency and respondent's agent just took the "assumed figures" to Bernard J. Flynn, United States Attorney in Baltimore, Maryland, and confused the United States Attorney as to the charges and as to the identity of the defendant (E. 47).

Petitioner contends that on those facts as put into the record by respondent there could thereafter be no legal conviction or sentence in this case. Those are the simple facts as stated by respondent, Andrew F. Oehmann, Head of the Criminal Section of the Department of Justice and Bernard J. Flynn, the United States Attorney. (Government Exhibit "A" and E. 47).

The Local District Court Rule 55 and local judicial procedure deprived petitioner of his counsel and forced petitioner to hire the son-in-law of the local Judge and his partners for the trial of the case. (E. 54, 55, 56). The son-in-law of the Judge, who lived with the Judge (E. 54-55) and his partners raised no objection to the trial of petitioner on a forged, confused indictment (E. 46-47); on "assumed figures" known to be wrong; and so admitted by respondent to the Judge in open court (Tr. 5-27-52, page 495; and the local counsel determined before the case was concluded, and before the verdict of the jury, that if petitioner did not agree to the payment of a predetermined fee for an appeal that he would have the Judge sentence petitioner the very next day; have petitioner sign a paper which he would file in the court to have petitioner begin serving a sentence at once, have petitioner fingerprinted and immediately shipped out of Baltimore while he and his associates discussed and determined the minimum fee to charge petitioner for an appeal of the case. (E. 57-73). The letter mentioned by G. C. A. Anderson when he was testifying as a Court witness on page E. 72 was rejected in the record but was filed as Exhibit "A" attached to the petition for Mandamus, (Case 8552) and it shows that after the sentence was imposed on June 6, 1952 and after petitioner's Notice of Appeal of June 6, 1952 had been received by the Court (Tr. 9-10-52, page 11) and mailed to petitioner's wife for filing by local counsel, that Anderson and Morrow discussed the fee for the appeal and they determined and quoted a minimum fee of seven or eight thousand dollars on June 19, 1952 at which time they proposed to use the Notice of Appeal filed by petitioner on June 6, 1952.

The letter (E. 72) referred to by G. C. A. Anderson (testifying for the Court), was written by James S. Morrow on June 19, 1952, three days after the time for filing an appeal had expired but Mr. Morrow knew that Judge Chesnut had received petitioner's notice of appeal and the other two letters of June 6, 1952 and that the Judge had noted that the Notice of Appeal had appealed the case. Mr. Morrow knew that the letter had then been mailed to petitioner's wife for transmission to counsel to enable counsel to share in the fees for the appeal and that there was then no rush to discuss and decide the fees to be charged. The letter shows that Morrow and Anderson leisurely discussed the fees to be charged and decided that "the minimum fees would probably run between seven and eight thousand dollars". (Exhibit "A" of Motion in United States District Court, rejected by the Clerk of the District and filed as an Exhibit attached to Petition for Mandamus in Case No. 8552, one of the cases of the petition in this Court).

That letter written by James S. Morrow, Jr., on June 19, 1952, thirteen days after the sentence was imposed and quoting "minimum fees of between seven and eight thousand dollars" for the law firm of Anderson, Barnes and Coe for continuing the prosecution of the appeal under the Notice of Appeal filed by petitioner on June 6, 1952. All of the parties knew that the appeal would have to be prosecuted under the Notice filed by petitioner on June 6, 1952 as no Notice of Appeal could be filed after June 19, 1952. Wilson K. Barnes, the son-in-law of Judge Chesnut knew that Judge Chesnut had received petitioner's Notice of Appeal of June 6, 1952 and that his law firm could earn the quoted fee of seven or eight thousand dollars for

prosecuting the appeal on the Notice filed by petitioner on June 6, 1952. He lived with Judge Chesnut at 111 Ridgewood Road, Baltimore 10, Maryland and shared the same house, telephone, food, light, heat and he knew that his law firm could not quote a fee of "between seven and eight thousand dollars" for an appeal of this case on June 19, 1952 without availing itself of the Notice of Appeal filed by petitioner on June 6, 1952. Anderson, Barnes, Coe and Morrow all knew the Notice of Appeal had been filed by petitioner on June 6, 1952 and that no other Notice of Appeal could be filed or would be necessary to appeal this case.

> JUDGE CHESNUT STATED IN OPEN COURT: Now, I recall receiving a letter from Mr. Funkhouser during that period, shortly after, and before present counsel came into the case, which was generally to the effect that he had no idea of appealing. (Tr., 9-10-52, p. 11).

The record shows that the Notice of Appeal of June 6, 1952 was the only letter received by Judge Chesnut from petitioner shortly after the sentence was imposed and before present counsel (W. Byron Sorrell) came into the case which mentioned petitioner's idea of appealing. (App. 55).

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Page 2

Petitioner notified the District Court in writing on June 6, 1952, the same day the sentence was imposed that he had discharged his lawyer, Anderson, and was addressing himself directly to the Court, complained about the trial and asked the Court to "please examine the record and accept this as my notice of appeal, motion for a new trial, or appeal of this case No. 21794".

Petitioner contends that was full compliance with the Rule Involved and that if it were not so considered by the District Court the rule required the clerk to prepare and file forthwith a notice of appeal on behalf of the defendant.

Reply to Page 3

Petitioner says that immediately after the sentence was imposed and while in the Marshal's lock-up he was confronted by G. C. A. Anderson of counsel who had represented him in the trial who advised him that it was a necessary duty imposed on him by the Court to secure defendant's signature on the paper presented and that under the shock of the imposition of the sentence, being handcuffed, and placed in the Marshal's lock-up he signed the paper presented to him by the lawyer upon the representation of counsel that it was a necessary Court paper for him to secure. Petitioner contends that paper signed in confusion and shock a few minutes after the imposition of the sentence was of no lasting or binding importance as petitioner was afforded by law a period of ten days after the imposition of the sentence in which to determine and file a Notice of Appeal.

Petitioner says that immediately upon his recovery from the shock of the imposition of the sentence he wrote and had mailed to the District Court a Notice of Appeal (App. 55). And petitioner says that later on that same day he wrote two additional letters to the United States District Judge who had imposed the sentence (Government Exhibit "A" and Government Exhibit M-1) in each of which he complained of imposition and deception by respondent in the trial, complained that the case had been rejected by the

Department of Justice before it was presented to the United States Attorney for the forged, false, phony, confused indictment; and petitioner offered in both of those letters proof of the facts and referred the Court to verification of the facts by a Certified Public Accountant. (Govt. Ex. "A").

Petitioner says that it took him over six years to assemble enough proof of the injustice of the trial and conviction to hazard the Motion of March 28, 1958 and the result shows that motion was premature as important papers were still being withheld from the record.

By late 1959 petitioner had proof that the Notice of Appeal and other letters of June 6, 1952 had been received by the Court and not filed in the Court record, that the indictment was a forgery never presented to the grand jury, that there was no record of any grand jury proceedings, and that respondent had made no examination of the books, records and returns, made no assessment of any deficiency in taxes; that the charges in the indictment were false, that the indictment had been secured by confusing petitioner with another Mr. Funkhouser from West Virginia and that many important papers and important testimony was being withheld from the District Court record. Petitioner renewed the motions and amplified his pleadings in the District Court.

The District Court denied the motions and in the Court of Appeals respondent produced as an exhibit ("A") attached to a SECOND SUPPLEMENTAL BRIEF BY RESPONDENT one of the three letters written to Judge Chesnut by petitioner on June 6, 1952 which had been withheld by Judge Chesnut from the District Court Records from June 6, 1952 to August, 1960. The

letter was presented to confuse the Court of Appeals about the writing of the Notice of Appeal of June 6, 1952. It was presented and represented to be the only letter written on June 6, 1952. Respondent told the Court of Appeals:

> "Without seeking to labor the point made by these exhibits, we mention the fact that Mr. Funkhouser has not claimed that he wrote two letters to Judge Chesnut on June 6, 1952, and it would be most remarkable if he had done so and not mentioned it in his letter of December 3, 1952. We respectfully submit that the claim that Appellant attempted to appeal his conviction within the time for appeal has been completely discredited and that the present appeal should be denied."

Reply to Page 4

The Court of Appeals remanded the case to the District Court to receive evidence upon the issues raised. (282 F. 2d 341.)

> JUDGE CHESNUT TOLD THE COURT OF APPEALS: No motion for a new trial was filed and the defendant waived appeal. (Decision of 6-2-58).

> JUDGE CHESNUT HAD ALSO TOLD MR. SORRELL: Here there has been no such action on the part of the defendant here to take an appeal within the time allowed. On the contrary, there is an expressed wish precisely to the contrary. (Tr., 9-10-52, p. 10).

ON SEPTEMBER 11, 1961 JUDGE CHESNUT TESTIFIED IN DISTRICT COURT:

> By JUDGE THOMSEN: I think the proper thing is for him to make a statement.
>
> By JUDGE CHESNUT: To the best of my recollection and belief I did not receive the questioned

letter of June 6th from Mr. Funkhouser either then or at any time thereafter and knew not the contents or purported contents thereof until I had read in the second appeal of Mr. Funkhouser to the Court of Appeals in his case his statement by I think—I'm not sure whether it was a per curiam statement, but I think it was Judge Sobeloff speaking for the Court, that Mr. Funkhouser had said that he had written me this questioned letter and the United States Attorney, Mr. Pearson, had produced a letter of June 6th of different import, which I had received, and upon reading the opinion of the Court of Appeals that Mr. Funkhouser had filed what purported to be a copy of the questioned letter of June 6th, I sent down to the United States Attorney's office and was furnished a purported photostat of that letter. That was, I think sometime in the latter part of 1960. To the best of my recollection that is, I believe, the first time that I saw that letter or what purported to be a copy of it.

JUDGE THOMSEN: Mr. Funkhouser, if there are any questions that you would like me to ask Judge Chesnut, I will be glad to have you address questions to me, and if I think they are proper I may ask Judge Chesnut to reply? (Tr., 9-11-61, pp. 102-103).

By MR. FUNKHOUSER: Judge Chesnut said that I had no idea of appealing, and that's the thought that I would like answered. Is there anything in that letter?

By JUDGE THOMSEN: I think that is what I have got to decide, Mr. Funkhouser, a construction of the letter and what significance Judge Chesnut should have drawn from the letter of June 6, 1952. It seems to be a matter that I must pass upon in the first instance here now which the Court of Appeals will have a chance to hear if either side is dissatisfied with my ruling. You wrote this

letter. This letter is in evidence, and if you want me to draw inferences from it or decide what inferences Judge Chesnut should have drawn from it, I think that is a matter which you must address to me.

MR. FUNKHOUSER: Your Honor, the Judge can so quickly explain that, I think, and we will be through with him, to tell me what he meant when he says that I had no idea of taking an appeal.

Now, that letter does not mention appeal, and that letter was written after the appeal had been written and sent by me.

BY JUDGE THOMSEN: Well, now, Mr. Funkhouser, you are assuming that I am going to find that the handwritten letter of June 6th was sent. Whereas I must consider the whole case in the light of every paper which you signed on that day and other statements which were made to Judge Chesnut before the sentence was imposed.

I have given you a great deal of freedom in this hearing to present evidence and to argue the case as we go along because these points are more or less separate points. Judge Chesnut has made a statement, and I have asked him some additional questions.

Are there any other questions that you want me to put to Judge Chesnut or that you would like to ask Judge Chesnut?

MR. FUNKHOUSER: Yes, Your Honor: Judge Chesnut said that he has no recollection of receiving a letter from me which mentioned the appeal. Now, in his statement in open court he said he received a letter that he did mention appeal, and what did he mean by that?

BY JUDGE THOMSEN: You just can't ask those questions which are loaded questions because that isn't what he said. If you sent that letter to Judge Chesnut which you say you sent, then we have

one situation. I have got to decide whether you sent that letter or not as a matter of fact, and in order to decide that question of fact I have to consider all of the matters before me including the letters which were admittedly sent and received, the letters which were sent after June 6th to see whether I think they would have been sent and the language would have been used which was used, if you had sent the letter of June 6th or if you had not sent the letter of June 6th and must also read what was said at the hearing of June 10, 1952 in that connection. I must make that finding of fact based on all of these factors which you have quite properly called to my attention, and it is not for Judge Chesnut to argue the case one way or the other. It is for you and the Government to argue the case to me based upon all of the evidence which has been offered to me.

MR. FUNKHOUSER: Now, Your Honor, I think that Judge Chesnut has volunteered to answer questions, and he has answered several questions. He can answer, very easily, I believe, my questions of whether he believes I was satisfied to not file a notice of appeal, whether what I did of record showed that I had no intention of appealing.

I wrote a letter, Your Honor, to him and told him that he had been deceived and imposed upon, and I said other things in that letter which indicate that I was not satisfied with what happened.

Judge Chesnut admits that he received that letter. I didn't say anything in that letter about an appeal because I had already filed in the Court my notice of appeal.

But I would like him to just answer that question, and I believe that he can do it easily.

By JUDGE CHESNUT: My reference was made to your genuine letter of June 6th which the Court

of Appeals described as of different import from the one that you set up that you said you sent later.

MR. FUNKHOUSER: Now, Judge Chesnut said in his tone of voice that one letter was genuine.

JUDGE THOMSEN: What's that? He says in his tone of voice?

MR. FUNKHOUSER: That one letter was genuine, from which it is inferred that another letter maybe that he received was not genuine. Let's clear that up.

By JUDGE THOMSEN: Mr. Funkhouser, we will clear it up. We will clear it up in argument between the Government on one side and you on the other arguing on the evidence before me, and I hereby certify in the record that any reference to a tone of voice by Judge Chesnut which would carry any intimation that he was not being very calm and fair to you at this time is entirely unwarranted, and I will ask Judge Chesnut if he will leave the stand, and unless he wishes to remain he may be excused. (Tr., 9-11-61, pp. 111-115).

That testimony by Judge Chesnut and the questions and answers given shows that Judge Chesnut's testimony at best indicated that he has no recollection of receiving the letter of appeal. That although he admittedly received two letters (Government Ex. "A" and Government Ex. "M-1") both written by petitioner from the Baltimore Jail on June 6, 1952 he only remembers one of the letters and refers to that one as the genuine letter. Both letters (Government Exhibits "A" and "M-1") were found in Judge Chesnut's personal file in 1959 and 1961. Government Ex. "A" was presented to the Court of Appeals by respondent and Judge Chesnut as the only letter

written by petitioner on June 6, 1952. Ex. "M-1" was not located in Judge Chesnut's personal file until September 1961 and there was no explanation of why or how it was stached away in his private file so long. Neither letter was ever filed with the papers of petitioner's case in the District Court or acknowledged in any way. Neither letter made any mention of an appeal. The only letter written by petitioner to Judge Chesnut on June 6, 1952 which mentioned an appeal was the first letter (App. 55) which was petitioner's notice of appeal and which was referred to by Judge Chesnut in open Court as follows:

> By JUDGE CHESNUT: Now, I recall receiving a letter from Mr. Funkhouser during that period, shortly after, and before present counsel came into the case, which was generally to the effect that he had no idea of appealing. (Tr., 9-10-52, p. 11).

That statement by Judge Chesnut to Mr. Sorrell on September 10, 1952 describes the only letter written by petitioner shortly after the sentence was imposed and before Mr. Sorrell came into the case which mentioned the idea of appealing. Petitioner testified that it described the notice of appeal. (App. 55).

Reply to Argument on Page 4

1. Petitioner says that on May 11, 1962 he delivered 40 copies of the petition for the writ of certiorari to the Clerk of the Supreme Court and his check for $100.00 in payment of the filing fee and executed a petition to be signed by a Justice of the Supreme Court granting an extension of time for filing the record from the Court of Appeals of the Fourth Circuit. And on that same day, petitioner delivered to the

Clerk of the Supreme Court a receipt for service of two copies of Petition for writ of certiorari acknowledged this 11th day of May 1962. Signed, Archibald Cox, Solicitor General.

Petitioner says that his Petition was filed in time.

2. Petitioner says that his contentions have merit.

Reply to Page 5

(a) Petitioner says that the Internal Revenue Law of 1939, Section 145(b), under which he was prosecuted provides penalties for "failure to collect or truthfully account for and pay over any tax imposed by this chapter or any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof" (Sec. 145(b)).

Petitioner had reported all gross income and all expenditures and had complied with all of the requirements of the Internal Revenue Laws of 1939 (Sec. 41, 51, 54) and under the applicable law it was the statutory duty of respondent to examine those returns and determine the correct amount of income subject to the tax, Sec. 54), determine the correct amount of the tax (Sec. 57), make the required computations and determine if a deficiency in tax did exist (Sec. 271), and then if in the case of any taxpayer the Commissioner determined there was a deficiency in tax the chapter required the Commissioner to mail a 90-day notice of deficiency to the taxpayer and provided that the taxpayer could petition the Board of Tax Appeals for a redetermination of the deficiency and the Commissioner was prohibited from making

any assessment of a deficiency until the decision of the Board became final (Sec. 272).

Under those sections of the Internal Revenue Law no tax was due payable or evaded as charged by respondent. The sums set up in the indictment were false and prohibited by statute (Sec. 272). They were so ruled by the Department of Justice and the case was returned to the Internal Revenue for the required examination. (Government Exhibit "A").

The scope of Rule 35 is not limited. The wording is clear and covers the facts in this case. It is not to be confused with Rule 36 which authorizes the correction of clerical mistakes but Rule 35 is applicable to the correction of an illegal sentence at any time.

> "The Court may correct an illegal sentence at any time."

Rule 35 is the natural and logical authority for the execution of the Purpose and Construction of the Federal Rules of Criminal Procedure. Rule 2 sets out the purpose and construction of the rules as follows: These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

That is exactly what this petitioner is asking in this petition.

The cases cited by respondent are not applicable in this case.

Ford v. *United States*, 233 F. 2d 56, 58, 59, and *Commerford* v. *United States*, 64 F. 2d 28, 30.

In both of those cases the taxpayer failed to report gross income. Neither Ford or Cummerford reported correct gross income while the Court in this case found all gross income and all expenses were reported.

> By Judge Chestnut: In this case the Government does not charge fraud on the part of the taxpayer in the failure to report correct gross income but only alleges fraud in making deductions from gross income. (App. 8).

Petitioner listed all gross income and all expenditures of that income and it was the statutory duty of respondent (not petitioner) to make the determination of the correct amount of legally allowable deductions to determine the correct amount of income subject to tax. (Sec. 54, 57, 271, 272).

Reply to Page 5 (b)

Petitioner was a resident of the District of Columbia and he made and filed his returns in the District of Columbia and paid his taxes in the District of Columbia. Respondent maintained an office in the District of Columbia where petitioner had always transacted all business with respondent.

The prosecution of this case in Baltimore was unjust and when the facts were called to the attention of the Treasury Department, the Joint Committee on Internal Revenue Taxation, the House Ways and Means Committee, Judiciary Committee of the United States Senate, the Judiciary Committee of the House of Representatives and the Attorney General of the United States they had the Congress pass 72 Stat. 512, approved August 6, 1958 whereby a defendant can make a motion to be tried in the judicial district in which he was residing when the alleged offense of

income tax was committed. The injustice in this case has been recognized and corrected by the Congress of the United States and the President. The injustice of this prosecution should be corrected by the Court.

Reply to Page 6 (c)

Petitioner says that he does not contend that the indictment was signed by an Assistant United States Attorney. Petitioner says that the paper presented as an indictment in this case was not signed by any Assistant United States Attorney but is a plain forgery of the name of Bernard J. Flynn the United States Attorney. Bernard J. Flynn, the United States Attorney whose name was forged on the paper, testified that he did not sign it. No Assistant United States Attorney signed it. The paper bears nothing but a plain forgery of Bernard J. Flynn's name. It was not signed by the attorney for the Government as required by Rule 7 (c) of the Federal Rules of Criminal Procedure. Bernard J. Flynn did not present the case to a grand jury. No Assistant United States Attorney signed the fake indictment. Somebody who had no authority to sign his name as an attorney for the Government, or someone who wanted no share in the responsibility for the false paper forged the named of Bernard J. Flynn on the paper. The record shows there was confusion about the identity of petitioner and this petitioner was confused with a prominent Mr. Funkhouser from West Virginia who owned the largest building in Baltimore and had recently bought the John J. Raskob property on the Corsica River near Baltimore. (E. 47).

The record shows that respondent confused the United States Attorney and the District Judge. The

record shows the District Judge in his Charge to the jury said petitioner owned "twenty-five or thirty apartment houses or buildings": (App. 18). And because petitioner owned a few acres of land on the South River the Judge brought that to the attention of the jury as follows:

> By JUDGE CHESNUT: Was the 70 acres wooded or not?
>
> RESPONDENT'S WITNESS: Yes, I might say, I would say that from my observation the land is wooded because it is on the South River, and you can see that on the north side. Arms Creek is on the south side, and you enter in from a private beach. I mean it is made up of private owners who have bought lots in there and they divided it up into beach lots.
>
> By JUDGE CHESNUT: How many front feet of waterfront does he have?
>
> RESPONDENT'S WITNESS: I can't estimate it Your Honor.
>
> By JUDGE CHESNUT: What is the depth of the water there at the shore?
>
> RESPONDENT'S WITNESS: The depth of the water I would say in Arms Creek, I can estimate it would be more shallow than out in South River there. Arms Creek does feed into South River which is navigable.
>
> By JUDGE CHESNUT: Well, I think you have the description of the particular item which would seem to make the thing relevant.
> (Tr., 5-21-52, pp. 99-100).

There was no examination of the books and records or of the income tax returns, no determination of the correct amount of income subject to the tax, no inquiry about the items, no computation of the allowable

depreciation, no tabulation of the items, no determination of the amount of tax, no determination of any deficiency in tax, no notice of any deficiency, no redetermination of a deficiency by the Tax Court, no assessment of any deficiency in tax. There was nothing but some "assumed figures" set up by an agent without any inquiry or examination and then confusion about the parties, confusion with the Mr. Funkhouser from West Virginia, confusion and exaggeration about the property and apartments owned and confusion about the woods, number of feet of waterfront and the depth of the water there at the shore of some of the property. (Tr., 5-21-52, pp. 99-100).

The record shows that neither respondent, the United States Attorney, the District Judge nor the jury knew what it was all about and they were all confused from the beginning by the respondent. The agent testified that he had made no inquiry about the particular items, no inquiry about the specific checks, the amount of mortgage indebtedness, had made no calculation of the items, had made no tabulation of the items (App. 27, 28, 35, 36, 46, 48) and had just set up several different sets of "assumed figures" all of which were just reckless assumptions and known to be wrong (App. 48-49). Known to be wrong from the beginning as respondent told the Court:

> By Mr. Green: As a matter of fact, from the beginning it was never considered possible to work this case on a net worth basis. (Tr., 6-3-52, p. 1360).

On those facts it is easy to understand why no record was made of any grand jury proceeding and why no

United States Attorney or Assistant United States Attorney would sign the indictment. Why the case was started on a false forged indictment.

Reply to Page 7 (d)

The record shows that the Clerk of the Court notified petitioner's lawyer, T. Howard Duckett, that Rule 55 of the District Court required a local lawyer, that the Clerk waived the rule, and entered Duckett's appearance but the Court promptly appointed G. C. A. Anderson, the law partner of his son-in-law, Wilson K. Barnes, to revise the rules and G. C. A. Anderson retained the rule and the Court approved it. Anderson and Judge Chesnut's son-in-law Wilson K. Barnes split the fees paid by petitioner for the trial of the case and before the trial was completed, before the jury decided the case, G. C. A. Anderson forced petitioner into a decision to pay Anderson and Barnes a fee for an appeal or agree to begin serving the sentence immediately and file his own Notice of Appeal. The record shows that all of petitioner's letters of June 6, 1952 were diverted from the District Court files and were withheld from the record to frustrate any appeal of the case. That after petitioner had hired other counsel the local lawyers of Anderson and Barnes offered to pursue the case on the Notice of Appeal filed by petitioner on June 6, 1952 for a minimum fee of between seven and eight thousand dollars. (Exhibit "A").

The record shows that the local counsel forced on petitioner for the trial of this case by the local District Court Rule 55 failed to adequately represent petitioner from the failure to object to the phony, false, forged indictment to the request to the Judge to immediately

impose the sentence and the securing and filing of a consent to the immediate beginning of the sentence when a fee for an appeal had not been paid or agreed to before the case was completed.

Reply to Page 8 (e)

This Court has repeatedly held that it has power to correct injustice and illegality.

This sentence was the unjust and illegal conclusion of an unjust and illegal prosecution begun in violation of the statutory provisions for the determination of income taxes. This petitioner had complied with all of the requirements of the Internal Revenue Laws when he kept books and records and made and filed income tax returns in which he reported all gross income and all expenditures of that income.

This prosecution was illegal and prohibited by Section 272 of the law when there had been no inquiry about the particular items listed on the return, no determination of the correct amount of income subject to tax (Sec. 54), no determination of the correct amount of the tax (Sec. 57), no determination of any deficiency in tax (Sec. 271), no notice of any deficiency in tax as required by Section 272, no redetermination of any deficiency by the Board of Tax Appeals as required by Section 272 and no determination or final decision by the Board of Tax Appeals. No assessment of any deficiency in tax was made. No tax was determined, due, owing or payable as charged. The Department of Justice had rejected the case for prosecution and had returned it to the respondent for the required examination. The testimony of respondent shows that no examination had been made and respondent took some "assumed figures" to Baltimore

and confused the United States Attorney as to the identity of petitioner and confused petitioner with another Mr. Funkhouser from West Virginia, and confused or falsely stated that certain taxes were due, owing, payable and evaded. Respondent or somebody forged the name of the United States Attorney on a paper for a phony, false indictment, there is no record of any grand jury proceeding as required by Rule 6 (c) of the Federal Rules of Criminal Procedure and the petit jury was never given any calculation, computation or tabulation showing any tax determined, due, owing payable, assessed because none of those things had been done. Instead the jury was told about the age, education, experience, property, trees, number of front feet of waterfront, depth of the water there at the shore of some of the property which was ruled relevant.

Those are only a few of the things in the record of this case which brought about the illegal sentence which petitioner here asks this Court to correct. This Honorable Court has the power to correct this illegal sentence.

The record shows that before this illegal prosecution was completed the local counsel began djscussions with petitioner to secure a commitment for, or payment of an appeal fee in the event of a conviction at the end of the case, and when petitioner did not then immediately pay the local counsel for the filing of an appeal the counsel concluded that petitioner would not appeal and he went before the Judge immediately after the verdict and asked the Judge to immediately impose the sentence and immediately secured a consent to begin serving the sentence and although petitioner had ten days thereafter in which to decide

to appeal the case the local lawyer tried to foreclose that right by an immediate waiver of appeal. The record shows the local lawyer was the law partner of the son-in-law of the Judge.

The record shows that on the same day the sentence was imposed this petitioner began his efforts to have the illegal sentence corrected by writing four letters complaining of the sentence and petitioner has continued his efforts from that day to this day. Three of the letters written by petitioner on June 6, 1952 were written to the Judge who tried the case. None of them were recorded in the record of the case or acknowledged. They are now back in the record and they should be considered by this Honorable Court. Petitioner prays this Honorable Court to grant to petition and examine the record in this case.

Respectfully,

ROBERT E. FUNKHOUSER,
Petitioner

Davidsonville, Maryland.

June 20, 1962